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**ARIZONA ATTORNEY GENERAL**

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October 10, 1953  
Opinion No. 53-171

**TO:** The Honorable Wes Polley  
Cochise County Attorney  
Cochise County Courthouse  
Bisbee, Arizona

**RE:** Reconciliation of Arizona  
statutes dealing with  
negligent homicide and  
manslaughter.

**QUESTION:** May a defendant be charged  
with involuntary manslaughter  
under Section 43-2904, Arizona  
Code Annotated, 1939, where  
said defendant drove negligently,  
recklessly, and unlawfully, which  
act resulted in mortal injuries  
to the driver of another car, or  
may this defendant be charged  
only with negligent homicide under  
Section 66-155, Arizona Code Anno-  
tated, 1939, as amended?

The Arizona Negligent Homicide statute is found in the recently enacted Motor Vehicle Code under Section 66-155, A.C.A., 1939, as amended, which section reads as follows:

"66-155. Negligent homicide.--(a) When the death of any person ensues within 1 year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide.

(b) Any person convicted of negligent homicide shall be punished by imprisonment for not more than 1 year in the county jail or by fine of not less than \$100.00 nor more than \$1,000.00, or by both such fine and imprisonment.

(c) The department shall revoke the license or permit to drive and any nonresident operating privilege of any person convicted of negligent homicide."

The manslaughter provision of the Arizona Code is found in Section 43-2904, A.C.A. 1939, which provides:

"43-2904. Manslaughter defined.--Penalty.--  
Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: Voluntary, upon a sudden quarrel or heat of passion; involuntary, in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection. Manslaughter is punishable by imprisonment in the state prison not exceeding ten (10) years."

The two statutes above cited at first glance seem to overlap - and conflict in certain respects. The obvious intent of the Legislature in passing the statute providing for the crime of negligent homicide was to avoid the difficulties inherent in a manslaughter prosecution for a death resulting from an automobile accident. It is well-known fact that juries, and judges also, are loath to condemn a man as a felon who has been guilty only of negligence.

This problem is discussed in C.J.S., Motor Vehicles, Section 657, b, § 3, which reads as follows:

"(3) Other Homicides

Under some statutes, one who causes the death of a human being by the negligent or other specified operation of a motor vehicle is guilty of the crime of negligent homicide, reckless homicide, involuntary homicide, or other statutory designation therefor.

Under some statutes, frequently enacted in order to provide a specific offense, other than manslaughter, for certain homicides caused by the operation of motor vehicles or to make criminal specified homicides caused thereby which prior thereto did not constitute a criminal offense, one who causes the death of a human being by the negligent or other specified operation of a

motor vehicle is guilty of the crime of negligent homicide, or of reckless homicide, or involuntary homicide, or of criminal negligence in the operation of a motor vehicle resulting in death, or some other statutory designation for such an offense. Such statutes and statutes relating to manslaughter have been held not to be in conflict with each other. Although such offenses, sometimes by force of express statutory provision to that effect, have been held lesser offenses than the crime of manslaughter, and included within a charge of manslaughter committed in the operation of a motor vehicle, they are different from the offense of manslaughter or a grade thereof, and the lesser homicide offense does not include the greater crime of manslaughter.

The question whether accused is guilty of the offense is dependent on the facts and circumstances of the particular case. Such crime can be committed only as specified in the statutes defining it, and according to some authority only by means of a motor vehicle. Under some statutes, negligent homicide is of two kinds or degrees, one which happens in the performance of a lawful act and one which occurs in the performance of an unlawful act. It has been held to arise where a person is killed as a result of the operation of a motor vehicle at an immoderate or unreasonable rate of speed. In some jurisdictions a motorist who, by the willful and negligent use of his motor vehicle, injures and causes the death of another does not necessarily thereby come under statutes denouncing negligent homicide, but he may be guilty of some other form of criminal homicide."

There are many cases from other jurisdictions dealing with the problem of reconciling negligent homicide and manslaughter statutes. The California Supreme Court has dealt with the situation several times, which decisions are particularly impressive due to the fact that the Arizona and California manslaughter statutes are identical. The California Negligent Homicide statute has been amended subsequent to the following cases but that fact does not affect the validity of the decisions.

The Supreme Court of California in the case of PEOPLE v. POCHIASK, 14 Cal. 2d, 679, 96 P. 2, 788 (1939), discussed the distinction between voluntary manslaughter and negligent homicide, 1. c. 792:

\* \* \* \* \*

"It is within the function of the legislature to make laws defining what breaches of the public peace shall be made punishable. Accordingly it may specify various degrees of the same crime and require a different measure of punishment for each. It is apparent that by the enactment of section 500 (negligent homicide provision) of the Vehicle Code the legislature has specified a lesser degree of punishment when the homicide is committed in the doing of an unlawful act not amounting to a felony while operating any vehicle, or while driving in a negligent manner, than is meted out in the cases of homicides otherwise committed in the doing of an unlawful act not amounting to felony or without due caution and circumspection. Sec. 192, Pen. Code. When the legislature has so spoken and the court has stated the law to the jury in the language of the applicable statutes, it is not required to do more. People v. Fowler, supra; People v. Anderson, supra. Therefore, what may amount to a lack of 'due caution and circumspection' in cases of involuntary manslaughter committed in the doing of a lawful act, or what may constitute the driving of a vehicle 'in a negligent manner', are questions to be decided by the jury according to the particular facts in each case guided by appropriate instructions from the court. The practical difficulties of obtaining a conviction in automobile homicide cases arising under section 192 (manslaughter provision) of the Penal Code may have been the incentive for the enactment of section 500 of the Vehicle Code. That is, in order to foster greater care in the operation of such dangerous instrumentalities, the legislature may have afforded a means by which appropriate punishment may be imposed upon all who have caused death through a breach of duty of due care in such operation." (Parenthetical material supplied.)

\* \* \* \* \*

This same court in PEOPLE v. BECHARD, 14 Cal. 2, 690, 96 P. 2 794 (1939), dealt with a conviction for negligent homicide. In that case the court had given instructions defining ordinary negligence,

and at the request of the defendant had defined criminal negligence. The defendant appealed on the ground that these instructions were conflicting and there was no way to tell upon which instruction the jury had predicated its verdict of guilty. The court answered the defendant's objections in the following language, l. c. 795:

\* \* \* \* \*

"Defendant contends that the court erred in giving to the jury the following instruction: 'Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person.' At the request of defendant the court gave to the jury a number of instructions defining criminal negligence, among them the following: 'Criminal negligence, in degree goes so far beyond that negligence merely which suffices to impose a civil liability for damages as to constitute it criminal negligence for which the party guilty of it may be held criminally liable. In other words, in order to constitute criminal negligence there must enter into the act some measure of wantonness or flagrant or reckless disregard of the safety of others, or wilful indifference, and if no one of these elements enters into the act the person charged cannot be held guilty of criminal negligence.' It is argued that these instructions are conflicting, that the instruction given at the request of defendant states the rule applicable correctly and that a reversal should be ordered since it cannot be determined which instruction the jury followed.

"The Section of the Vehicle Code under which defendant was convicted provides: 'When the death of any person ensues within one year as the proximate result of injuries caused by the driving of any vehicle in a negligent manner or in the commission of an unlawful act not amounting to felony, the person so operating such vehicle shall be guilty of negligent homicide, \* \* \*'. By the enactment of this section the legislature defined a crime different from any of the crimes which had been defined in any of the various provisions of the Penal Code.

'Defendant is not in position to complain of the fact that the instructions actually given may have been conflicting, for the condition was brought about by his own request. Moreover, he did not suffer prejudice by reason of the giving of any of the instructions, some of which were more favorable to him than he could legally demand. (People v. Suesser, 142 Cal. 354 (75 P. 1093).)'"

In PEOPLE v. AMICK, 20 Cal. 2, 247, 125 P. 2, 25 (1945), the Supreme Court of California again differentiated between negligent homicide and manslaughter, and concluded that where the defendant had been charged with negligent homicide in one count and manslaughter in another, and the jury had found the defendant guilty of negligent homicide, and not guilty of manslaughter, the defendant had, nevertheless, been lawfully convicted because the crimes charged were not identical. A similar holding was made in the case of PEOPLE v. CROW, 48 Cal. App. 2, 166, 120 P. 2, 686 (1941), wherein the court answered the defendant's argument that the verdict of guilty of manslaughter was inconsistent with an acquittal of negligent homicide in the following words, l. c. 688:

\* \* \* \* \*

"Defendant's first proposition is untenable. The law is established in California that section 500 of the Vehicle Code (negligent homicide) defines a crime different from involuntary manslaughter, or from any other crime defined in the Penal Code. (People v. Beckhard, 14 Cal. 2d 690, 692, 96 P. 2d 794; People v. Poclask, 14 Cal. 2d 679, 686, 96 P. 2d 788.)"

\* \* \* \* \*

The Supreme Court of Arkansas in the case of PHILLIPS v. STATE, 204 Ark. 205, 161 S. W. 2, 747 (1942), held that the Arkansas manslaughter statute was not in conflict with and was not repealed by a later statute relating to negligent homicide by the use of an automobile. The Arkansas Court in that case went on to say that the state could have prosecuted the defendant under either the manslaughter or the negligent homicide statute.

For an excellent discussion of the problem covered by this opinion see "Negligent Homicide or Manslaughter: A Dilemma", 41 Journal of Criminal Law and Criminology, 183.

It is the opinion of this office, after an examination of the above-mentioned authorities that the Arizona manslaughter statute, Section 43-2904, supra, and the Arizona negligent homicide statute,

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Section 66-155, supra, are not in conflict with each other. A defendant whose negligent driving causes the death within one year of another person may be charged, depending on the facts, with either negligent homicide or manslaughter, in separate counts, at the discretion of the county attorney.

If we may be of any further assistance in this matter do not hesitate to call upon us.

ROSS F. JONES  
The Attorney General

R. DEAN BURCH  
Assistant to the  
Attorney General